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(1)

No.

In the

Supreme Court of the United States

TRANSGLOBAL TELECOM ALLIANCE, INC.
and JAMES D. CARRAWAY,

Petitioners,

versus

AT&T CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

I. WAS IT ERROR FOR THE DISTRICT COURT AND THE COURT OF APPEALS TO DENY PETITIONERS A JURY TRIAL ON THEIR CLAIMS BY REJECTING THE UNCONTRADICTED FACTUAL STATEMENTS OF PETITIONER'S PRINCIPALS, MADE IN AFFIDAVITS AND IN DEPOSITION TESTIMONY, THAT THEY HAD ENTERED INTO AN ORAL AGREEMENT WITH RESPONDENT FOR A JOINT CALL TURNAROUND PROJECT IN JANUARY OF 1994, THE TERMS AND PROVISIONS OF WHICH WERE LATER CONFIRMED IN A SERIES OF WRITTEN AGREEMENTS, WHERE THE COURT'S REJECTION WAS BASED SOLELY ON CERTAIN DOCUMENTS PRODUCED BY RESPONDENT WHICH DO NOT DENY THE EXISTENCE OF THE ORAL AGREEMENT AND, IN FACT, SIMPLY DISCUSS A PROPOSAL BY PETITIONER FOR AN ENHANCEMENT OF THE RELATIONSHIP CREATED BY THE INITIAL ORAL AGREEMENT

II. DID THE DISTRICT COURT AND THE COURT OF APPEALS COMMIT ERROR IN APPLYING THE FILED RATE OR FILED TARIFF DOCTRINE IN A CASE MORE PROPERLY COGNIZABLE UNDER THIS COURT'S SIERRA-MOBILE DOCTRINE SINCE : (A) RESPONDENT FILED A TARIFF WHICH MATERIALLY DEVIATED FROM THE TERMS, PROVISIONS AND CONDITIONS OF THE PARTIES' CONTRACT, EXPRESSED ORALLY AND IN WRITING; AND, (B) THE COURT FAILED TO TAKE INTO ACCOUNT THE IMPORT OF THE RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION ALLOWING CARRIERS TO ESTABLISH AND ENTER INTO NEGOTIATED CONTRACT TARIFFS WITH THEIR CUSTOMERS.

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The Memorandum Opinion and Judgment of the United States Court of Appeals for the Third Circuit in *AT&T Credit Corporation v. Transglobal Telecom Alliance, Inc.; James D. Carraway v. AT&T Corp.* is unreported and set forth in the Appendix hereto (App. 1a-8a).

The Letter Opinion of the United States District Court for the District of New Jersey in *AT&T Credit Corporation v. Transglobal Telecom Alliance, Inc.; James D. Carraway v. AT&T Corp.* is unreported and set forth in the Appendix hereto along with the District Court's Order and Final Judgment (App. 9a-36a).

BASIS FOR JURISDICTION

The Final Judgment of the United States Court of Appeals for the Third Circuit, affirming the Final Judgment of the District Court for the District of New Jersey, was entered on April 18, 2001 (App. 7a). This petition for a writ of certiorari is filed within 90 days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII - Civil Trials:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 56:

Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment,

interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers and parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bath faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Communications Act of 1934 - 47 U.S.C. § 211

Contracts of carriers; filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Communications Act of 1934 - 47 U.S.C. § 406

Compelling furnishing of facilities; mandamus; jurisdiction.

The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: *Provided*: That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: *Provided further*, That the remedy given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.

Communications Act of 1934 - 47 U.S.C. § 414

Exclusiveness of chapter

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

STATEMENT OF THE CASE

In November of 1993, respondent AT&T Corp. ("AT&T") had just completed a business case analysis of "call turnaround", a then developing service in the telecommunications industry. "Call turnaround" ("CTA") involves the "export" of a United States carrier's dial tone to a foreign customer through a computerized recognition and callback process. Using CTA, the foreign customer is provided with access to the network of a United States carrier and the CTA provider's rates for international and domestic calls. Those rates are substantially lower than the charges of the government controlled foreign telephone administrations ("FTA") and postal, telephone and telegraph authorities ("PTT") for such calls. With CTA diverting revenues from them, the FTAs and PTTs had filed proceedings with the Federal Communications Commissions ("FCC") seeking to have the FCC prohibit CTA. The FTAs and PTTs had persuaded AT&T, which had longstanding relationships with them, to join in their opposition to CTA.

The dramatic, if not explosive, growth of the CTA industry during 1993 was exerting significant, conflicting pressures on AT&T. If AT&T did nothing and allowed the expanding volumes of CTA traffic to be carried on other networks (i.e., MCI, Sprint), it faced the loss of substantial revenues and a reduction in its market share in foreign countries. Conversely, were AT&T to support CTA providers on a wholesale basis and/or to enter the CTA retail market on its own, AT&T feared the potential financial losses attendant to what was known as "accounting rate retaliation" by the FTAs and PTTs. To reconcile these divergent positions, the AT&T "business case" concluded that some form of partnership or collaboration with selected FTAs or PTTs presented the only viable option. Such a collective effort would preserve revenues and market share for AT&T while minimizing the risk of "accounting rate retaliation" by the FTAs and PTTs.

While AT&T was considering how to address the CTA problem, Michael Clifford ("Clifford"), a Florida businessman, contacted AT&T in October of 1993 about business opportunities in the telecommunications industry. Clifford was eventually put in contact with Don Smith ("Smith"). Smith was AT&T's Vice President in charge of a global region covering Latin America, the Middle East and Asia. Smith met with Clifford for several hours on January 1, 1994 at the Driftwood Hotel in Vero Beach, Florida. Smith then met with Clifford and his partner, petitioner James D. Carraway ("Carraway"), on January 5, 1994 at Smith's AT&T office in Coral Gables, Florida.

During these meetings, Smith made a comprehensive oral agreement with Clifford and Carraway for a joint CTA project. The joint CTA project would be conducted initially within Smith's region, with a special focus on the Latin American nations. AT&T's customer losses in Latin America, to Sprint, MCI and CTA providers, had, in Smith's view, reached critical proportions. In Smith's opinion, AT&T's support of a separate company in a joint CTA project would fulfill all of the objectives which AT&T had identified in the November 1993 business case study. At Smith's recommendation, Clifford and Carraway elected to use Transglobal Telecom Alliance, Inc. ("Transglobal"), a Delaware corporation they had organized in late 1993, to implement their side of the agreement with AT&T.

Smith also discussed with Clifford and Carraway the possible expansion of the joint CTA project, both geographically, i.e., on a global basis, and by way of a formalized partnership agreement with AT&T. The possible enhancements included AT&T capital investment in the combined entity and worldwide co-marketing support. The global partnership was subject to AT&T corporate and headquarters approval. For this purpose, Smith referred Clifford in early January to Robert Baulch ("Baulch"), an AT&T District Manager, who had supervised the November 1993 business case study of the CTA industry. Clifford

wrote to Baulch in early January 1994 to introduce himself and the global partnership concept.

Under the agreement they reached with Smith, Clifford and Carraway were to supply CTA service in other countries to new customers, former AT&T customers and existing AT&T customers who were threatening to switch their telephone service to one of the other major carriers or to a CTA provider. Clifford and Carraway agreed to utilize AT&T equipment, AT&T lines and AT&T minutes exclusively to furnish CTA service. Clifford was to meet and negotiate agreements with the respective FTAs and PTTs to provide that the FTAs and PTTs would receive a share of the CTA revenues (to compensate them for some of their CTA losses). Clifford and Carraway were to commit at least $300,000 in initial funding for the venture and devote themselves to the project, on a full-time basis, once it became operational.

On the other side, AT&T undertook to provide Clifford and Carraway with favorable pricing for AT&T equipment needed to process calls, technical support, and the location of the switching equipment at a major AT&T telecommunications switching facility located in Atlanta, Georgia. AT&T also agreed to provide, through a contract tariff, its best available legal rates, on a wholesale basis, for the package of telecommunications services required for the CTA setup. The broad agreement was not reduced to writing at that time. The parties contemplated that the various undertakings would be documented in separate contracts or sub-agreements, as necessary.

Smith contacted Mary Jane McKeever, who was in charge of AT&T's International Wholesale Division in Business International Services, by telephone on mid-January of 1994. Smith introduced Clifford to McKeever to discuss with her, as the tariff specialist, the type of low wholesale rates which TTA required for the joint CTA project. Clifford and Carraway met with Baulch and McKeever in New Jersey on January 26, 1994 to discuss the contract tariff and Smith's

concept for a formal global partnership between AT&T and Transglobal. On January 31, 1994, Clifford wrote to Baulch and McKeever to further describe the global partnership concept. Baulch indicated he would pursue the approval of the formal global partnership within AT&T, while McKeever would be responsible for the wholesale contract tariff.

Over the ensuing months, the various components and companion agreements needed for the CTA project were methodically assembled. In February, 1994, Smith arranged for Clifford to meet personally with representatives of the FTAs and PTTs in Colombia (Telecom) and Ecuador (Emetel) (with the participation and assistance of AT&T's regional offices and officers in those countries). The purpose of these meetings was to discuss and conclude CTA cooperation and revenue sharing agreements with Telecom and Emetel. These and later efforts by Clifford, under Smith's sponsorship, produced agreements, letters of intent or substantial progress towards contractual commitments with Ecuador, Nicaragua and nine other Latin and Central American countries. Smith's regional personnel also furnished Transglobal with lists of prospective customers and made introductions to some of the larger customers.

Even before these marketing activities were underway, Smith had dispatched technical personnel to analyze Transglobals equipment requirements and assigned sales personnel to assist in the procurement process. Transglobal placed an order in late March of 1994 for an AT&T "Conversant", the major piece of switching equipment required for Transglobal's CTA operation. The order was accepted at a discounted price of less than $90,000 (as opposed to a retail price of $150,000). Transglobal was unable to obtain bank lease financing for the Conversant and the related computer software and hardware. Moreover, the anticipated delivery date for the Conversant was several months beyond the projected operational start date in May of 1994. Through Smith's contacts, AT&T Credit Corp., an affiliate of AT&T, promised to provide the lease financing

for Transglobal's acquisition of the Conversant and related equipment. Global Business Systems, the AT&T division which manufactured the Conversant, expedited TTA's order to insure that delivery would be made in May. In April of 1994, Transglobal and AT&T signed a Master Building Licensed Space Agreement, providing for the installation of Transglobal's equipment in AT&T's major switching facility in Atlanta.

Transglobal and AT&T also made rapid progress in concluding the contemplated contract for AT&T to supply Transglobal with the telecommunication services needed for the CTA operation. Mary Jane McKeever, for AT&T's International Wholesale Division, and Clifford, for Transglobal signed an April 11, 1994 AT&T Proposal for Switched Services (the "April 11, 1994 Proposal"). The April 11, 1994 Proposal detailed services, rates, terms and conditions. Pursuant thereto, AT&T committed itself to prepare a contract tariff for the provision of telecommunications services to Transglobal, incorporating the terms and conditions of the April 11, 1994 letter. AT&T also promised to begin "...the tariff filing procedure required to offer service..." Shortly after the April 11, 1994 Proposal had been signed, Baulch informed Clifford that AT&T had decided not to formally "partner" with Transglobal. Nevertheless, AT&T and Transglobal pressed on to complete the tasks needed to make the joint CTA project operational.

While AT&T was drafting the Transglobal tariff for filing with the FCC, Transglobal learned that another Florida company, Global Access, Ltd., had negotiated a tariff (Contract Tariff 1119) with lower rates. Clifford complained to McKeever about CT1119. After some discussion, McKeever reduced the rate structure for Transglobal's international calls, utilizing another"existing contract tariff". According to McKeever, the new rates offered to Transglobal constituted AT&T's "best deal in the marketplace" (emphasis supplied). By letter dated May 11, 1994, the rate structure and other changes were memorialized

and accepted in a letter signed by Diane Gilbert, for AT&T, and by Clifford, for Transglobal. The tariff was then finalized and sent to Transglobal. On June 3, 1994 (by telefax) and/or June 6, 1994 (by overnight delivery), Transglobal returned the signed tariff document (designated as "Contract Tariff TTA") to AT&T.

Also on June 6, 1994, the joint CTA project became operational. Transglobal began receiving and switching customer calls using the Conversant at the Atlanta Facility. Contract Tariff TTA had not yet been filed with the FCC. AT&T agreed to provide service to Transglobal at undiscounted rates under its General Tariffs 1 and 2. AT&T also agreed to incorporate a credit into the contract tariff for the difference between the lower wholesale rates in Contract Tariff TTA and the higher general tariff rates. Transglobal had not yet received a credit approval from AT&T's Credit Department. However, Transglobal was not required to post a security deposit for the service to be provided under the general tariffs, although such a deposit was required by the tariffs. Instead, McKeever's International Wholesale Division assumed responsibility, in writing, for payment of the costs of service provided to Transglobal.

Despite its undertaking to Transglobal, AT&T did not file Contract Tariff TTA. AT&T misled Transglobal, first, by telling Transglobal that the tariff had been filed and, second, by inducing Transglobal to execute a revised tariff on June 28, 1994. AT&T misrepresented to Transglobal, in writing, that the changes in the revised tariff constituted only "minor modifications". In point of fact, AT&T had unilaterally redefined the classifications of eligible customer traffic which counted towards satisfaction of the minimum volume commitments Transgobal had made. The effect of these "minor modifications" was to prevent Transglobal from meeting its volume commitments by sales of service to former AT&T customers who had shifted their business to another carrier or reseller and to current AT&T customers who had expressed interest in CTA service. The exclusion of

these customers adversely impacted TTA'a ability to meet the volume commitment level required for significant rate discounts and also exposed TTA to substantial penalties. None of these new provisions were reflected in the oral agreement, the April 11, 1994 Proposal, the May 11, 1994 letter or the version of Contract Tariff TTA signed by Transglobal in early June. When Transglobal discovered these material changes, it promptly wrote to AT&T to object to them. On July 18, 1994, while the discussion of AT&T's unilateral changes continued, AT&T filed the revised version of Contract Tariff TTA, now designated as CT 1387, with the FCC.

Discussions between AT&T and Transglobal during July and August proved fruitless. AT&T refused to restore the original "eligible traffic" definition that had been set forth in Contract Tariff TTA and was part of all of the earlier agreements, oral and written. AT&T manufactured a new dispute over the revenue allocation formula for the lockbox arrangement that was to serve as a substitute for the required security deposit. To compound these bad faith actions, AT&T then would not allow Contract Tariff 1387 to become effective. However, it continued to bill Transglobal for the service provided during the summer at the more expensive general tariff rates, without the promised differential credit. Transglobal was unable to pay the AT&T bill, having charged its customers based on the discounted rates in Contract Tariff TTA (and CT1387). Shortly thereafter, Transglobal stopped doing business.

This action was then instituted by complaint filed against petitioners by AT&T Credit Corporation ("AT&T Credit"). AT&T Credit had financed Transglobal's equipment acquisition through a lease. AT&T Credit sued Transglobal, as lessee, and Carraway, as guarantor, for damages for breach of the lease and for recovery of the equipment.[1] Petitioners commenced their action against

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[1]Third party plaintiffs settled with plaintiff AT&T Credit after

respondent AT&T by Third Party Complaint filed on August 21, 1996. Petitioners sought damages from AT&T on theories of breach of contract, breach of fiduciary duty, fraud and negligent misrepresentation, all related to AT&T's failure to perform its obligations under oral and written agreements for the joint CTA project. AT&T filed an Answer and Counterclaim on September 30, 1996. Therein, AT&T sought to recover the amounts billed to Transglobal for the telecommunications services provided to Transglobal and sums due under the Master Building Space License Agreement for Transglobal's use of space in the Atlanta switching facility.

Following extended discovery, AT&T moved for summary judgment pursuant to Fed. R. Civ. P. 56. TTA and Carraway filed opposition to the motion, including lengthy affidavits from Clifford and Carraway and relevant excerpts from their depositions describing, in detail, the history of the transaction and AT&T's misconduct. In a Letter Opinion and Order issued on March 1, 2000, the District Court granted AT&T's motion, dismissed the Third Party Complaint and awarded relief to AT&T on its Counterclaim. The District Court found that there were no genuine issues of material fact, precluding summary judgment on Transglobal's breach claims. The District Court analyzed an oral "joint marketing contract" or partnership agreement which Transglobal had never alleged or sought to prove as the basis for its claims. The District Court totally disregarded the Clifford and Carraway affidavits (as well as their consistent deposition testimony). The District Court deemed these sworn statements to be "...self-serving and noticeably unsubstantiated..." (App. 20a). Instead, the District Court relied upon "...the uncontraverted written evidence in this case..." (App. 20a), even though those documents pertained to the proposed global expansion and formalized partnership enhancements. The District Court also ruled that

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proceedings were concluded in the District Court.

Transglobal's claims were barred by the filed rate doctrine. (App. 24a-27a). On March 29, 2000, the District Court entered Final Judgment, dismissing the Third Party Complaint with prejudice and awarding AT&T damages in the amount of $442,992.06 (App 35a).

On appeal, the Court of Appeals for the Third Circuit affirmed. The Court of Appeals accepted the District Court's mischaracterization of Transglobal's contract claim and the rejection of the evidence in the Clifford and Carraway affidavits, based on the "...overwhelming documentary evidence pointing in the other direction..." (App 4a). While distinguishing between the joint CTA project limited to Smith's region and the proposed global partnership agreement, the Court of Appeals also did not analyze with any depth whether the so-called "documentary evidence" related to the agreed project or, as was actually the case, the proposed global partnership. Thus, in the Court's view, the "evidence" was "so one-sided that no reasonable jury could find in TTA's favor and AT&T must prevail as a matter of law." (App. 3a, 4a). As with the District Court, the Court of Appeals did not consider the impact of the FCC's new negotiated contract tariff regime in concluding that the Filed Rate Doctrine prevented Transglobal's recovery of damages.

Transglobal and Carraway have duly filed their petition for a writ of certiorari within ninety (90) days of the entry of the Third Circuit's judgment.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS MADE BELOW BY THE DISTRICT COURT AND BY THE THIRD CIRCUIT COURT OF APPEALS VIOLATED THE GOVERNING PROCEDURAL PRINCIPLES FOR ADJUDICATING SUMMARY JUDGMENT MOTIONS, AS ARTICULATED BY THIS COURT IN 1986, WITH RESPECT TO THE TYPE OF BURDEN PLACED ON A DEFENDANT-MOVING PARTY AND THE ADMONITION AGAINST ASSESSING THE CREDIBILITY OF THE NON-MOVING PARTY'S PROOFS WHILE QUALITATIVELY WEIGHTING THE EVIDENCE PRESENTED BY THE NON-MOVING PARTY, THUS DEPRIVING PETITIONERS OF THEIR ENTITLEMENT TO A TRIAL BY JURY IN THIS CASE TO DECIDE THE DISPUTED QUESTIONS OF FACT CONCERNING CONTRACT FORMATION AND BREACH

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986), this Court reinvigorated the summary judgment procedures available under Rule 56 of the Federal Rules of Civil Procedure. The summary judgment "trilogy", as it was named by the commentators, was read by many as an exhortation to the lower courts to utilize such dispositive motion practice with greater resolve and frequency for purposes of dismissing weak cases and clearing congested dockets. See, e.g., Bratton, "Summary Judgment Practice in the 1990s: A New Day Has Begun Hopefully" 14 Am. J. of Trial Adv. 441, 443 (1991). Whether the "trilogy" broke new substantive/procedural ground or simply provided a clearer

perspective on traditional adjudicative principles is now of little moment. This Court fashioned a set of guiding principles to govern the consideration and disposition of summary judgment motions which have been invoked and applied over the past fifteen years.

However, as this case plainly illustrates, the lower courts are paying closer attention to the policy exhortation than to the defined decisional precepts of Celotex, Anderson and Matsushita in screening cases for trial. Moreover, the early fears and predictions that certain ambiguous language in Celotex and Matsushita would be taken as authority for the trial courts to make otherwise unwarranted dispositions of cases that should go to trial has, unfortunately, been realized. Issacharoff & Loewenstein, "Second Thoughts About Summary Judgment", 100 Yale L. J. 73, 84, 89 (1990); Weakland, "Summary Judgment In Federal Practice: Super Motion v. Classic Model of Epistemic Coherence" 94 Dickenson L. Rev. 25, 26-27 (1989); Stempel, "A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process", 49 Ohio St. L. J. 95, 159, 162 (1982) (hereinafter, "Shimmering View"). In the process, those courts are abrogating the constitutional right of litigants to have genuine issues of material fact, bearing on their meritorious claims, determined at trial by a jury.

In Celotex Corp. v. Catrett, 477 U.S. 317, the Court held that Rule 56 did not require that a party moving for summary judgment and not having the burden of proof at trial "...support its motion with affidavits or other similar material negating the opponent's claim." 477 U.S., at 323. Rather, the moving party could discharge its initial burden by showing the "...absence of evidence..." to support an essential element in the non-moving party's case. 477 U.S., at 325.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, the Court provided content to the "materiality" standard, concluding that any disputes over facts that might legitimately affect the outcome of the case under governing

substantive law are material under Rule 56. 477 U.S., at 248. Second, the Court noted that the test for determining whether there is genuine issue of material fact entails a process which is a functionally similar to the test applied on a motion for a directed verdict (i.e., whether the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party). 477 U.S., at 248-252. As the Court pragmatically observed, there "... is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"". 477 U.S., at 249. In making that determination, the Court cautioned the lower courts to respect the traditional allocation of functions between the judge and the jury:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. [477 U.S., at 255; citation omitted]

Third, this Court ruled that, in determining whether the non-movant's evidence presents a jury question, the lower court must apply the evidentiary standard imposed by controlling substantive law. 477 U.S., at 252-254.

Finally, in Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, the Court affirmed a summary judgment in favor of the Japanese or Japanese controlled defendants in an antitrust case involving an alleged 20 year predatory pricing conspiracy to drive American companies from the consumer electronic products market. The District Court decided the issue not by resolving factual disputes, but,

by determining, as a matter of substantive law, the level or type of evidence required to sustain a verdict. 475, U.S., at 573-579. This Court ruled, as a matter of controlling substantive antitrust law, that while inferences to be drawn from the underlying facts must be viewed in the light most favorable to the movant, "...antitrust law limits the range of permissable inferences from ambiguous evidence ..." 475 U.S., at 588. Accordingly, a case may not go to the jury if plaintiffs produce no direct evidence of conspiracy and an inference of lawful conduct from circumstantial evidence is at least as plausible as an inference of conspiracy. 475 U.S. at 595-598. Thus, since price-cutting is a major and legitimate tool in business competition, the Court indicated that antitrust law required evidence tending to exclude the possibility that defendants were engaged in lawful competition. 475 U.S., at 587-588.

In the instant matter, both the District Court and the Court of Appeals blended the distinct technical rules for summary judgment proceedings, as articulated in Celotex, Anderson and Matsushita, in a confusing and, at times, contradictory manner. At the threshold, both courts uncritically accepted respondent's mischaracterization of Transglobal's contract claim. Simply stated, AT&T's motion was predicated upon an oral "joint marketing contract" or formal global partnership agreement which Transglobal never pleaded nor attempted to prove. Transglobal conceded as much, indicating that those arrangements were contractual enhancements not necessary or indispensable to the joint CTA project. The approach taken in Celotex and Anderson require, at a minimum, a correct identification of the factual and legal elements of the claim being raised by the non-moving party in order for the balance of the analytical procedures to function in their proper context. When claim "formulation" is as badly skewed by the non-moving party as it was here, the focus of the summary judgment inquiry is immediately distorted beyond recognition and can yield only inaccurate and unjust results.

Second, while eschewing forbidden credibility determinations as part of their evaluative process, it is eminently clear that the District Court and the Court of Appeals totally discounted the Clifford and Carraway affidavits presented in opposition to the motion (as well as their consistent deposition testimony). While the District Court was more overt (both at oral argument and in its letter opinion) in expressing its seeming disbelief, the Court of Appeals disguised its view under the rubric of "overwhelming evidence" and what a "reasonably jury" would do. Thus, as the Anderson dissents by then Justice Rehnquist (477 U.S. at 268) and Justice Brennan (477 U.S. at 257) clearly foresaw, and as some of the later scholarly commentaries suggested, see, e.g. Childress, "A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183, 192 (1991), the language of Anderson and Matsushitas "plausibility" concept might be read together by the lower courts as authority to make unjustified "qualitative" determinations as part of the more limited evidentiary sufficiency review.

Here, Clifford and Carraway gave detailed testimony as to their discussions with Smith, the terms of the agreement they made with him, the preparation of those written documents needed to implement certain parts of their oral agreement and the performance rendered by both parties pursuant to their respective undertakings in the oral contract. Moreover, this is not a case where the moving party impeaches the opposing affidavits based on prior inconsistent statements by the affiant or party Those kinds of cases have long been subject to a set of rules which allow the trial courts to sort out whether the evidence presented in opposition to summary judgment should be credited as a basis for generating a genuine issue of material fact. See, e.g. Schwarzer, Hirsch & Barrans, "The Analysis and Decision of Summary Judgment Motions", 139 F.R.D. 441, 479-480 (1991); Duane, "The Four Greatest Myths About Summary Judgment", 52 Wash. & Lee L. Rev. 1523, 1595-1611 (1998)

. Instead, the lower courts deemed Clifford and Carraway to be unworthy of belief based on the supposedly uncontroverted written evidence. To the extent that conclusion is laced with a Matsushita "plausibility" overlay, it falls under its own weight. The fact that businessmen might make an oral agreement involving significant dollars is not, in any way, inherently implausible, irrational or illogical.

However, none of respondent's internal documents (which were quite few in number) denied or directly addressed the issue of whether Clifford and Carraway had made an oral agreement with Smith in January of 1994. In fact, abbreviated references in certain of those memos clearly reflected that the wholesale telecommunications supply contract (which was a component part of Transglobal's overall agreement) was always positioned separately and on a different track from both the proposal for a formalized "partnership" between AT&T and Transglobal (being managed by Baulch) and the proposal for a "co-marketing agreement" (being handled by McKeever after Contract Tariff TTA was signed). Further (and overwhelming) proof that the various "contracts" were traveling down different tracks at all times arises from the fact that Transglobal pursued the lease financing agreement, the space license agreement and the wholesale supply contract to conclusion following AT&T's April 1994 decision not to enter into a formal partnership. The natural expectation would be that all of these efforts would have ground to a screeching halt if they were part or parcel of some global "partnership" agreement. By the same token, Transglobal was up and running in June of 1994 without the support to be provided under a global co-marketing agreement with AT&T (which was not drafted and sent to AT&T until July, 1994)

Nevertheless, the District Court and the Third Circuit, with an unexplained preference for written materials to establish an oral agreement, a large blindspot for the reasonable inferences to be drawn from the corroborating performances of the parties and a lurking "plausibility" piece,

exalted AT&T's oblique internal memos over petitioners' sworn testimony. Clifford's letters of January 6, 1994 and January 31, 1994, which deal exclusively with the enhanced agreements being proposed, were minutely analyzed in the lower court's opinions for what they say and what they do not say. The Circuit Court believed that Clifford's initial letter to Baulch in early January should have prominently mentioned his agreement with Smith. From the Circuit Court's perspective (without explaining its reasons), the failure to disclose the agreement meant there was none, as clear a "credibility" determination as there would be. Clifford's letters might offer territory to be explored on cross-examination. However, Clifford's explanation of their structure and purpose as "proposals" for the enhanced relationship, which he explained during his deposition, would blunt and repel such an attack. The letters do not, on their own, undermine anything Clifford or Carraway had to say in their affidavits or depositions, contrary to the interpretations of the lower courts.

As one article observed with respect to the overreliance on documents in adjudicating summary judgment motions:

> "When a judge has a predisposition on the case, particularly, a desire to end the case by granting summary judgment, he or she may inadvertently grant too much credence to documents set forth by the movant. When these documents do not have witness exposition, cross-examination, and focused consideration, there is less with which the nonmovant can expose the self-serving, unreliable or unpersuasive character of the movant's documents." (Stempel, "Shimmering Mirror", 49 Ohio St. L. J. at 178-179, footnotes omitted).

The traditional allocation of the functions of judge and jury required the denial of AT&T's summary judgment motion and the submission of the case to a jury. Nothing in Celotex, Anderson or Matsushita dictated a different result. However, the lower courts are, and have been, straying from the doctrinal and analytical lines drawn in the summary judgment trilogy, at the expense of a party's constitutional right to a jury trial. Petitioners respectfully submit that this Court should once again consider the standards of Rule 56, and the application of the trilogy's tenets by the lower courts, in order to restore the correct balance. This case affords the appropriate vehicle for such review.

II. THE DISTRICT COURT AND THE COURT OF APPEALS COMMITTED ERROR IN APPLYING THE FILED RATE OR FILED TARIFF DOCTRINE IN A CASE MORE PROPERLY COGNIZABLE UNDER THIS COURT'S SIERRA-MOBILE DOCTRINE SINCE: (A) RESPONDENT FILED A TARIFF WHICH MATERIALLY DEVIATED FROM THE TERMS, PROVISIONS AND CONDITIONS OF THE PARTIES' CONTRACT, EXPRESSED ORALLY AND IN WRITING; AND, (B) THE COURTS FAILED TO TAKE INTO ACCOUNT THE IMPORT OF THE RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION ALLOWING CARRIERS TO ESTABLISH AND ENTER INTO NEGOTIATED CONTRACT TARIFFS WITH THEIR CUSTOMERS

Transglobal argued below that its contract breach claims and the contract tariff regime adopted by the FCC in 1991 removed this case from consideration under the principles of the Filed Rate or Filed Tariff Doctrine. The

District Court and the Court of Appeals dismissed this contention in cursory analyses which, quite simply, failed to give the appropriate weight to the innovation of negotiated contract tariffs under the FCC's rules and regulations. This Court, while having recently discussed the doctrine in an unrelated context in American Telephone and Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998), has not had the opportunity to consider the interaction between the doctrine and the FCC's rules and regulations. Petitioners contend that the Filed Rate/Filed Tariff Doctrine does not apply where the parties have negotiated and agreed upon a contract which the carrier does not, thereafter, file or where the carrier files a tariff which is materially inconsistent with the contract. Overlaying those issues is the salient question of the impact of this Court's Sierra-Mobile doctrine upon the facts presented here by petitioner.

Beginning in 1991, the FCC adopted rules and regulations allowing carriers to establish "contract tariffs" with their customers. See, In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, 6 F.C.C. Rec 5880 ("Matter of Competition"). These rules were designed to increase flexibility for customers and to promote competition among carriers. A carrier may negotiate a contract tariff individually with a customer. At least one customer must enter into a contract with the carrier, pursuant to the new tariff, in order for the carrier to file the contract tariff. 47 C.F.R. § 61.3(m). The tariff must be filed at least fourteen days prior to the effective date of the contract. Matter of Competition ¶¶ 91, 121, 6 F.C.C. Rec., at 5897, 5902. The filed tariff is required to include only summary information with respect to the terms of the contract (including renewal options, if any), a brief description of each of the services to be provided, the contract price for each of these services, the minimum volume commitments for each service, any volume discounts, as well as any other classifications, practices and regulations affecting the contract rate, thereby complying with the filing

requirements of 47 U.S.C. § 203(a). Id. at ¶¶ 121, 122, 6 F.C.C. Rec., at 5902. After fourteen days, the contract tariff is effective, assuming neither the FCC nor any member of the public objects. Id. at ¶¶ 91, 121, 122; 47 C.F.R. § 61.58(c)(6), 61.42(c)(8). The FCC will presume that rates filed in a contract tariff are reasonable. Matter of Competition, ¶ 74, 6 F.C.C. Rec., at 5894 (emphasis supplied). The carrier must make the contract tariff generally available to other similarly situated customers. Matter of Competition, ¶¶ 91, 129, 6 F.C.C. Rec., at 5897, 5903. In this way, the FCA's prohibition against discrimination among customers is not violated. Matter of Competition, ¶¶ 126-132, 6 F.C.C. Rec., at 5902-5903. Further, where an international service reseller like Transglobal is involved (which may require FCC authorization under 47 U.S.C. § 214), a carrier like AT&T may enter into "contracts, agreements and arrangements", with such entities, which , by statute, must be filed with the FCC pursuant to 47 U.S.C. § 211(a). See, generally, 12 F.C.C. Rec. 17600 (approving § 214 applications for resellers of international service).

Here, petitioners asserted an oral agreement with AT&T, made in January, 1994, for telecommunications service at the lowest wholesale rates legally available from AT&T. That basic agreement was amplified in the subsequent implementing writings – the April 11, 1994 Proposal Letter, the May 11, 1994 amendment letter and Contract Tariff TTA signed by Transglobal in early June of 1994. The terms, provisions and conditions expressed in those documents are internally consistent with each other and with the oral agreement. However, beginning in late June, 1994, respondent AT&T attempted, in effect, to renegotiate what was a "done deal". When Transglobal objected and resisted, AT&T frustrated the realization of Transglobal's reasonable expectations and objectives by refusing to reinstate Contract Tariff TTA and by replacing it with the modification version, Contract Tariff 1387 (as filed with the

FCC).

Under the holdings of this Court, the provisions of the pertinent FCC rules and/or 47 U.S.C. § 211(a), AT&T had a duty to file a tariff conforming with the contract for telecommunications services which it had agreed to with Transglobal. By derivation, it could not refuse to file any tariff for Transglobal, thereby abdicating its statutory duty in that regard or, as argued below, a contractual duty arising from its undertakings in the April 11, 1994 Proposal and the implied covenant of good faith and fair dealing. Similarly, AT&T could not unilaterally modify, supersede, abrogate or terminate the previously negotiated contract through an inconsistent tariff filing. FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); Global Access Ltd. v. AT&T Corp., 978 F. Supp., 1068, 1073-1075 (S.D. Fla. 1997).

The filed rate/filed tariff doctrine thus has no applicability here. Transglobal is not, either directly or indirectly, challenging a tariff. In contrast, the claim relates to the lawful and proper practice of effecting the filing of a tariff based upon a contract. Cf. MCI Telecommunications Corp. v. F.C.C., 917 F.2d 30, 38 (D.C. Cir. 1990). Those kinds of contractual obligations are governed by common law, except as expressly modified by statute, whether the claim is analyzed with Transglobal as a § 214 communications carrier, see, e.g. Bell System Tariff Offerings, F.C.C. Docket 19896, 46 F.C.C. 2d 413, 432-433, or as a customer. Matter of Competition, Memorandum Opinion and Order, ¶ 24, 25, 10 F.C.C. Rec. 4562, 4573-4574. AT&T's default in performing such obligations would appear to fall within the scope of the state common law claims preserved under § 414 of the Communications Act of 1934, as amended. 47 U.S.C. § 414. Thus, the contract breach claims asserted by petitioners should have been preserved intact for adjudication at trial.

The Court of Appeals' treatment of this issue was, at best, diffuse and largely irrelevant. Its reliance on the integration and exculpatory clauses in AT&T's standardized Contract Tariff Order is unavailing. Transglobal did not expressly waive respondent's violation of its statutory and contractual duties to file the contract or, in the alternative, a tariff conforming to the contract. It was precisely the revised versions of Contract Tariff TTA (redesignated as CT 1387 for filing) to which Transglobal objected and which produced the supposed "core" issue disagreements. Nevertheless, that kind of "revision" process naturally falls within the ambit of the Sierra-Mobile doctrine.

The Court of Appeals also dismissed, too abruptly, the claim that Transglobal did not require CT 1387 and that any tariff with the lowest wholesale rates would suffice to satisfy the parties' agreement. At the threshold, the "failure of proof" ascribed to Transglobal should have been laid at AT&T's door. AT&T is clearly in the superior position for identifying its wholesale contract tariffs. Of interest on this point also are the provisions of 47 U.S.C. § 406, enabling the District Courts to grant, as a cumulative remedy, mandamus relief requiring a carrier to furnish facilities for such communication or transmission "at the same charges or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person..."

Finally, the damages issue adverted to by the Court of Appeals to buttress its conclusions on the Filed Rate Doctrine was never briefed below at either level. However, this Court's decision on the subject in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 580-581 (1981) ("ARKLA") and the progeny of ARKLA in the lower courts are plainly distinguishable on the ground that negotiated contract rates, like those here, are presumed to be reasonable by the FCC. Thus, the Supremacy Clause and Filed Rate Doctrine considerations at issue in ARKLA are not extent, especially inasmuch as the FCC never rejected the rate structure of

CT1387.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit and, ultimately, to vacate and reverse the final judgment below and remand the matter to the District Court for trial.

Respectfully submitted,

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(any footnotes trail end of each document)

UNREPORTED - NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1426

AT&T CREDIT CORPORATION

v.

TRANSGLOBAL TELECOM ALLIANCE, INC; JAMES D. CARRA WAY,

Third-Party Plaintiffs

v.

AT&T CORP.,

Third-Party Defendant

Transglobal Telecom
Alliance, Inc. and
James D. Caraway,
Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 95-cv-03676)
District Judge: Honorable Nicholas H. Politan

Argued April 2, 2001

Before: ROTH, STAPLETON and
GREENBERG, Circuit Judges
(Memorandum Opinion filed: April 18, 2001)

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MEMORANDUM OPINION

ROTH, Circuit Judge

Transglobal Telecomm Alliance (TTA) appeals from the grant of summary judgment against it on its third-party complaint against AT&T, alleging breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation,

based on AT&T's breach of an alleged oral agreement and failure to provide the best available legal rates for telecommunications services. Our review is plenary and we affirm the decision of the District Court.

From our review, we conclude that there is no genuine issue of material fact as to the existence of an oral agreement between TTA and AT&T. The only evidence in the record of the existence and terms of such an agreement were the affidavits from TTA's two principal officers, Michael Clifford and James Carraway. Nothing in the record from AT&T indicates that it similarly understood that it had entered into an agreement or what the terms of that agreement were. To the contrary, as the District Court discussed in detail, the overwhelming documentary evidence suggests that AT&T's consistent understanding was that the parties were in negotiations and working towards a potential or proposed partnership or agreement and that AT&T merely was willing to keep an open mind on these discussions.

Importantly, in none of Clifford's correspondence with AT&T, most notably a letter written on January 6, the day after the second meeting with Don Smith of AT&T at which the alleged oral agreement was finalized, did Clifford ever mention, discuss, or even hint that any binding oral agreement had been reached. That January 6 letter mentioned only having "a couple of brief meetings with Mr. Donald W. Smith," never implying that these brief meetings had yielded a binding million-dollar agreement. We find it significant that a letter, written contemporaneous with the alleged oral agreement, never mentioned or suggested that agreement. Moreover, we agree with the District Court's conclusion that a review of Clifford's correspondence in its entirety affirmatively establishes that Clifford never understood there to be any binding agreement or partnership between TTA and AT&T, even for Smith's limited regions in Latin America and Asia.

The District Court did not improperly weigh evidence or judge credibility in granting summary judgment. Rather, the instant case is an example of the evidence being so one-sided that no reasonable jury could find in TTA's favor on this issue and AT&T must prevail as a matter of law. The Clifford and Carraway affidavits, standing alone and with no other support in the record, cannot create an issue of fact as to the existence of an oral agreement in the face of the overwhelming documentary evidence pointing in the other direction. Summary judgment on this point was proper.

Moreover, even assuming the existence of an oral contract, TTA cannot recover the damages it seeks. TTA claims that it is entitled under the oral agreement to the "best available legal rates" for telecommunications services, meaning the rates agreed to in the April and May letters negotiating a contract tariff or contained in Contract Tariff 1387 (CT 1387); TTA seeks to recover those rates and terms as damages. This claim fails for two reasons. First, any oral agreement was superseded by the terms of the Contract Tariff Order (CTO), signed by TTA on June 6, which expressly provided that the CTO constituted the entire agreement between the parties and superseded all prior agreements, proposals, representations, statements, or understandings, whether written or oral, regarding telecommunications services. Any oral agreement that might have been made as to the rates to be charged for service no longer had any legal force. Similarly, any rates and terms suggested in the April and May letters were superseded by CT 1387, which was attached to and incorporated into the CTO, rendering the letters without legal force. The CTO also provided that TTA's sole remedy for AT&T's breach of the CTO was to terminate it; no damages are available under the express terms of the contract and the instant claim is precluded as a matter of law.

We reject TTA's suggestions that the CTO was not the real agreement for services, that the earlier April and May letters constitute the real agreement, and that TTA should not be stuck with terms and provisions to which it did not agree. TTA signed the CTO, which contained the language explicitly superseding all prior agreements, limiting TTA's remedies, and incorporating the rate terms of CT 1387; TTA thereby did agree to those terms and provisions and must be bound by them. There is no basis not to hold TTA to a contract it signed, apparently without objection. The District Court was correct in holding that the CTO barred a damages action.

Second, the rates and terms of CT 1387, which never were made effective, cannot be the basis for an award of damages, pursuant to the Filed Rate or Filed Tariff Doctrine. The doctrine prohibits telecommunications service providers from charging rates other than those contained in tariffs properly filed and approved by the FCC. It also precludes courts from awarding damages for breach of contract based on rates, terms, or services promised, in whatever manner, but never presented in a published and approved tariff. See AT&T v. Central Office Tel., Inc. 524 U.S. 214, 228 (1998) (holding that Filed Rate Doctrine preempted state law contract and tort claims to recover damages for rates and services that were promised but not contained in a filed tariff); Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 490 (2d Cir. 1998) (holding that court could not award as damages the service and rate benefits promised in unsigned letter but not contained in filed tariff).

We reject TTA's attempts to distinguish these cases based on its having an allegedly binding oral agreement; the clear point of Central Office and Fax is that any promises not established in a tariff, filed and approved by the FCC, cannot form the basis for a damages award in a breach of contract action. The District Court was correct in its application of the

Doctrine in granting summary judgment.

TTA also argues that it could recover damages based on a different wholesale tariff, already on file with the FCC, offering more favorable terms and rates than the general tariff under which it was charged. But TTA presented no evidence of any other filed tariff for which it would have been eligible or which would have been available to it. TTA, not AT&T, bears the burden of presenting such evidence in order to establish damages. Its failure to do so in the instant case precludes recovery for such measure of damages. Finally, any other measure of damages, such as lost profits, would be too speculative for recovery.

We will affirm the judgment of the District Court.
TO THE CLERK:

Please file the foregoing Memorandum Opinion.

By the Court,
/s/_____
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1426

AT&T CREDIT CORPORATION

v.

TRANSGLOBAL TELECOM ALLIANCE, INC; JAMES D. CARRAWAY,

Third-Party Plaintiffs

v.

AT&T CORP.,

Third-Party Defendant

Transglobal Telecom Alliance, Inc. and James D. Caraway, Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 95-cv-03676)
District Judge: Honorable Nicholas H. Politan

Argued April 2, 2001

Before: ROTH, STAPLETON and GREENBERG, Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States District Court for the District of New Jersey and was argued on April 2,2001. On consideration whereof

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 30, 2000, be and the same is hereby affirmed.

Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated; April 18, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS .
NICHOLAS H. POLITAN
DISTRICT JUDGE

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NOT FOR PUBLICATION

March 1, 2000

THE ORIGINAL OF THIS LETTER OPINION IS
ON FILE WITH THE CLERK Of THE COURT

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Re: AT&T Credit Corporation
v. Transglobal Telecom Alliance, Inc., et al.
v. AT&T Corp.
Civil Action No. 95-3676 (NHP)

Dear Counsel:

This matter comes before the Court on two motions, namely:

(1) the motion by third-party defendant AT&T Corporation for summary judgment on the Third-Party Complaint filed by defendants/third-party plaintiffs Transglobal Telecom Alliance, Inc. and James Carraway; and (2) the motion by third-party defendant AT&T Corporation for partial summary judgment on its counterclaim for failure to make payments for services rendered against defendant/third-party plaintiff Transglobal Telecom Alliance. For the reasons stated herein, the motion by third- party defendant AT&T Corporation for summary judgment on the Third-Party Complaint is GRANTED and the Third-Party Complaint filed by defendants/third-party plaintiffs Transglobal Telecom Alliance, Inc. and James Carraway is DISMISSED WITH PREJUDICE. Additionally, the motion by third-party defendant AT&T Corporation for

partial summary judgment on its counterclaim for failure to make payments for services rendered against defendant/third-party plaintiff, Transglobal Telecom Alliance, is GRANTED[1]

BACKGROUND

By way of background, on or about July 19, 1994, defendant/third-party plaintiff Transglobal Telecom Alliance, Inc. ("Transglobal") executed a Master Equipment Lease Agreement("Agreement") which was accepted by plaintiff, AT&T Credit Corporation ("AT&T Credit"), on August 5, 1994. Pursuant to this Agreement, AT&T Credit agreed to lease telephone equipment to Transglobal. At the same time, Transglobal executed Master Equipment Lease Agreement Schedule 00010 ("Schedule 00010"). According to Schedule 00010, AT&T Credit leased to Transglobal an AT&T Conversant Communications System and other related equipment ("the Leased Equipment") for a lease term of forty-eight months, commencing August 31, 1994, with monthly rental payments of $4,537. 41.[2]

On or about July 19, 1994, Transglobal executed a document acknowledging that the Agreement, Schedule 00010, and all other agreements constituted the entire agreement between Transglobal and AT&T Credit relating to the Leased Equipment. Transglobal also executed a Master Equipment Lease Agreement Commencement Certificate ("Commencement Certificate"), in which Transglobal acknowledged delivery, acceptance, and proper working condition of the Leased Equipment.

Also on or about that same day, defendant/third-party plaintiff James D. Carraway ("Carraway") executed a Master Equipment Lease Agreement Guaranty ("Guaranty"), personally guaranteeing to AT&T Credit the full and prompt payment, observance, and performance when due of all obligations of Transglobal under the lease.

Soon after the lease commenced on August 31, 1994, Transglobal's account became delinquent with AT&T Credit. Transglobal made its November 1994 payment, but made no further payments. The Agreement and Schedule 00010 (collectively referred to as "the Lease") provided for a series of specific remedies to AT&T Credit in the event of Transglobal's default. For example, if Transglobal failed to make any monthly payment within ten days of the due date, Transglobal would be obligated to pay AT&T Credit a late charge of 5% of the monthly payment. It also obligated Transglobal to pay AT&T Credit interest at a rate of 1½% per month.

In the nascent stages of the case, Transglobal and Carraway denied that they were in default in performing their obligations under the Lease documents and that no payments were due to AT&T Credit. They alleged that the reason they had to discontinue their operations was that AT&T Corporation ("AT&T Corp.") breached its agreement with Transglobal which provided that AT&T Corp. would furnish equipment, lines, and minutes to Transglobal to start up its call turnaround ("CTA") business.[3] As a result, Transglobal joined AT&T Corp. as a third-party defendant in this case for breach of this alleged agreement.

On May 22, 1997, the Court issued an Amended Letter Opinion and Amended Order granting a motion by AT&T Credit for summary judgment against Transglobal and Carraway and denying Transglobal and Carraway's cross-claim to compel discovery responses. The Court further ordered that Transglobal and Carraway were jointly and severally liable in the amount of $250,658.58, plus interest, legal fees, and costs of suit and ordered that AT&T Credit take immediate possession of the leased equipment. Specifically, this Court found that a contractual relationship existed between AT&T Credit and Transglobal, Transglobal

breached the contract, and AT&T Credit suffered damages. This Court also found that, because Transglobal breached the Lease and because Carraway personally guaranteed the terms of the agreement, without waiving any affirmative defenses, offsets and counterclaims, summary judgment was also appropriate as to Carraway.

The alleged agreement between Transglobal and AT&T Corp. is now the subject of the present motions.

STATEMENT OF FACTS

Transglobal and Carraway filed a Third-Party Complaint against AT&T Corp. wherein they alleged: (1) breach of contract; (2) breach of fiduciary duty; (3) fraud; and (4) negligent misrepresentation. See Third-Party Complaint.

The facts relevant to the Third-Party Complaint are provided herein. In Fall 1993, Carraway and his business associate, Michael Clifford ("Clifford"), neither of whom had any significant background in the telecommunications industry, began to explore possible business opportunities in the international long distance market. See Third-Party Complaint at ¶15; See also Deposition of Carraway at pages 21, 24, 28. In order to further this possible business opportunity, Clifford contacted several AT&T Corp. employees. Eventually, Clifford was referred to Donald W. Smith ("Smith"), an executive of AT&T Corp. who was based in South Florida and was responsible for handling AT&T Corp.'s relations with foreign telephone companies in Central and South America. See id., at ¶16.

Smith agreed to meet with Clifford for the first time at 7:00 a.m. on January 1, 1994. According to Clifford, the meeting lasted approximately three hours during which Smith discussed the CTA business and the problems it was creating for AT&T Corp. in his region. See id. at ¶17. Clifford also

contends that, during this meeting, Smith proposed that AT&T Corp. enter into a business relationship with Carraway and Clifford to jointly market and provide CTA service, at a low rate to their company, Transglobal, via a Contract Tariff, in Smith's region. See id. at ¶¶17-24; see also Affidavit of Michael K. Clifford at ¶11 ("Clifford Affidavit")

Transglobal and Carraway maintain that Clifford "accepted the offer as outlined by Smith." See id. at ¶¶24, 25. In his supporting affidavit, Clifford explained more specifically, "[a]fter a three and a half hour meeting, Mr. Smith and I shook hands on our agreement, subject to his meeting with Mr. Carraway and his being satisfied that we had the personal commitment and financial resources needed to implement the joint CTA project." See Clifford Affidavit at ¶11. According to Clifford, "Mr. Smith, Mr. Carraway and I met at Mr. Smith's AT&T office in Coral Gables on January 5, 1994. Once Mr. Smith was convinced that Carraway and I had both real interest and real money to invest, our negotiations concluded and an agreement was reached." See id. at ¶12.

In response, AT&T Corp. denies that an agreement was reached between the parties at any time.

Transglobal and Carraway filed a Third-Party Complaint wherein their claims against AT&T Corp. essentially fall into two categories. First, Transglobal and Carraway contend that AT&T Corp. breached an oral agreement, allegedly entered into in January 1994, to join in a partnership or joint venture with Transglobal for the purpose of marketing Transglobal's proposed CTA business. Second, Transglobal and Carraway allege that AT&T Corp. breached its obligation pursuant to the oral agreement to provide telecommunications services to Transglobal under a contract tariff.

DISCUSSION

I. Standard of Review

The standard governing a summary judgment motion is set forth in Fed. R. Civ. P. 56(c), which provides, in pertinent part, that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Procedurally, the movant has the initial burden of identifying evidence that it believes shows an absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) . When the movant will bear the burden of proof at trial, the movant's burden can be discharged by showing that there is an absence of evidence to support the non-movant's case. Id. at 325. If the movant establishes the absence of a genuine issue of material fact, the burden shifts to the non-movant to do more than "simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In this matter, there are no genuine issues of material fact and therefore, summary judgment is appropriate.

II. Joint Marketing Contract

Transglobal and Carraway contend that AT&T Corp. breached an oral agreement, allegedly entered into in January 1994, to join in a partnership or joint venture with Transglobal for the purpose of marketing Transglobal's proposed CTA business. In response, AT&T Corp. denies that an oral agreement to enter into a joint venture was ever reached between the parties.

"A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (citations omitted). Accordingly, if the parties agree on the "essential" terms and also manifest an intent to be bound by those essential terms, an enforceable contract will be created. See id. See also Graziano v. Grant, 326 N.J. Super. 328, 339-40 (N.J. Super. Ct. App. Div. 1999). "Where the parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable." Id. (citing Heim v. Shore, 56 N.J. Super. 62, 72-73 (N.J. Super. Ct. App. Div. 1959))

This Court finds that there is no evidence that the parties even articulated, much less, agreed to the essential terms of an agreement to form a partnership-either verbally or in writing. In fact, the uncontroverted written evidence in this case demonstrates that the discussions between AT&T Corp. and Transglobal regarding a joint marketing arrangement in the CTA business, either in Smith's region or anywhere else, never advanced beyond the preliminary stages of discussion. For example, in a letter dated January 6, 1994, Clifford, at the suggestion of Smith, wrote to Robert Baulch ("Baulch"), the AT&T employee responsible for the negotiation of possible partnerships, seeking to open "further dialog" on the

possibility of an alliance between Transglobal and AT&T Corp. See Appendix of Exhibits and Excerpts of Deposition in Support of AT&T Corp.'s Motion for Summary Judgment, Exhibit 1 at page 1. Clifford wrote that, based on "a couple of brief meetings with Mr. Donald W. Smith," Transglobal was "of the opinion that [its] Call Turnaround (CTA) business . . . would be a much more successful venture **if** we formed an alliance with AT&T." See id. at page 1 (emphasis added) . Clifford further noted that "an alignment with AT&T **would** give our company a wonderful entry" into the business. See id. (emphasis added) . Acknowledging that Transglobal "**would** look to AT&T" to provide them with the best possible rates in order for the venture to be competitive, Clifford stated that it was Transglobal's "**intent** to structure a relationship with AT&T and the Foreign Telephone Administrations that is a clear 'win win' situation for all parties involved." See id. at pages 1- 2 (emphasis added) . Clifford concluded that letter by suggesting that Baulch give him a call "to discuss a **possible** next step." See id. at page 2 (emphasis added).

In a letter dated January 31, 1994 from Clifford to Baulch and Mary Jane McKeever ("McKeever"), the AT&T employee responsible for negotiating a contract tariff with Transglobal, Clifford stated that Transglobal planned "to work in a dedicated, exclusive alliance with a U.S. Carrier" and " [w]e would strongly prefer that alliance be with AT&T due to the superior quality of your network and the known ethical behavior of your management." See id., Exhibit 2 at page 3. Clifford then identified the "benefits that we see for AT&T entering into this 'preferred provider' or 'co-marketing' agreement with [Transglobal]" and listed Transglobal's "requests from AT&T" as "lowest possible rates," "technical support," "and "marketing support." See id. at pages 4-5. He then concluded by stating that: "[w]e **propose** that AT&T enter into this venture with us;" "[w]e **propose** a simple Letter of Intent be created, possibly as a

'co-marketing' agreement of 'key vendor' agreement, in order to proceed;" and "[w]e do **hope** we can work together on this venture." See id. Exhibit 2 at pages 6-7 (emphasis added).

Later correspondence between AT&T Corp. and Transglobal demonstrates that the joint marketing proposal was never accepted by AT&T Corp. For example, on March 10, 1994, Baulch wrote to Clifford confirming that he would be the sole person at AT&T responsible for matters relating to "any **potential** partnership" between AT&T and Transglobal." See id. Exhibit 4 (emphasis added) . Clifford responded to Baulch by letter dated March 18, 1994 wherein he asserted that Transglobal **"will not, misrepresent to any party that a partnership with AT&T is eminent [sic] or in the making ..."** while AT&T continued to work to see **if** indeed a partnership is in both our mutual best interests." See id., Exhibit 5 at page 1. (emphasis added).

Similarly, Baulch wrote to Clifford that he was "continuing to work" on the issue of an AT&T and Transglobal partnership. See id., Exhibit 6. Significantly, Baulch also pointed out that "[u]ntil we have concluded our evaluation and formalized any **potential** partnerships, no introduction by AT&T to foreign PTTs can occur." See id. (emphasis added). In response Clifford provided Baulch with Transglobal's "initial 'wish list'" regarding their **proposed** co-marketing or partnership agreement between AT&T and Transglobal. See id. Exhibit 7 at page 1. Therein, Clifford listed the same items which Transglobal presently claims were part of the January 1994 oral contract. See id.

AT&T's internal documents also make clear that no partnership or co-marketing agreement was ever agreed to by the parties. For example, in an internal memorandum dated February 25, 1994, Baulch summarized the discussions between AT&T and Transglobal by stating that "AT&T was

recently approached by a venture company to partner with them in a call turnaround business.", See id. Exhibit 11 at page 3. More specifically, Baulch noted that Transglobal "has made a verbal **proposal** to AT&T to enter into this partnership" but "[a]t this time AT&T has made no response" to Transglobal." See id. (emphasis added); see also Internal Memorandum from Meiling Chin of AT&T dated March 8, 1994 (Exhibit 12 at page 2) ("**no agreement** for a co-marketing relationship or exclusivity has been made"); Internal Memorandum from Meiling Chin of AT&T dated March 9, 1994 (Exhibit 13 at page 2) (Transglobal "is not to infer the existence of any co-marketing arrangement with AT&T. Currently, there is **none**. . , .") (emphasis supplied)

On April 14, 1994, Baulch wrote to J.R. McFarland and T. Luciano that the AT&T team which was evaluating Transglobal as a "**prospective** partner for AT&T" in the CTA business "reached a consensus that they **did not** wish to develop a partnership with [Transglobal] but rather wished to proceed in having AT&T enter the [call turnaround] market on its own in partnership with select correspondents." See id., Exhibit 14 (emphasis added) . A copy of this memorandum was forwarded to Transglobal's attorney, "Bill" Potter. See id., Exhibit 44 at page 386. See also Clifford Affidavit, ¶51.

Documents relating to Clifford's dealings subsequent to the date of the aforementioned memorandum confirm that no partnership or co-marketing agreement was ever entered into. For example, in a letter dated June 3, 1994, Clifford wrote to McKeever that Transglobal's attorney would be sending a "**proposed** co-marketing agreement" to AT&T for review. See id., Exhibit 15 at page 2 (emphasis added). Clifford also wrote that he hoped, that AT&T would find Transglobal's "**proposed** co-marketing or partnership agreement" attractive. See id. (emphasis added)

On July 11, 1994, Clifford forwarded what he described as

the "long overdue" Cooperative Marketing Agreement "proposed" by Transglobal. See id., Exhibit 16 at page 1. The Cooperative Marketing Agreement was not executed by AT&T. See id.

The Court is satisfied that the uncontroverted written evidence in this case demonstrates that the discussions between AT&T Corp. and Transglobal regarding a joint marketing arrangement in the CTA business, either in Smith's region or anywhere else, never advanced beyond the preliminary stages of discussion. Any cooperation which existed between the parties was a necessary means for attempting to negotiate a contract and, contrary to what Transglobal would have this Court believe, did not create the terms of a contract.

Furthermore, both Carraway and Clifford, in their self-serving and noticeably unsubstantiated affidavits, do not even purport to reference a single document executed by both parties which actually reflects the terms of an agreement to enter into a partnership for marketing the CTA service. Although Carraway asserts in his affidavit that "[v]arious segments of the agreement did require separate legal instruments which were later drafted or executed," he does not identify these documents for the Court. See Carraway Affidavit, ¶16. Overall, the statements contained in the affidavits of both Carraway and Clifford only indicate that there was a significant amount of discussion about whether AT&T and Transglobal **would** enter into a partnership to provide CTA service.

II. Contract Tariff

A. January 1994

Transglobal and Carraway also allege that AT&T Corp. breached its obligation pursuant to the oral agreement in

January 1994 to provide telecommunications services at a low rate to Transglobal under a contract tariff.

As aforementioned, it is clear that the negotiation of a contract tariff for the supply of telecommunications services to Transglobal was a matter separate and distinct from the discussions involving a joint partnership or co-marketing arrangement. For example, on March 10, 1994, Baulch wrote to Clifford confirming that McKeever would be the person at AT&T responsible for the negotiation of a contract tariff while Baulch would be the person to contact regarding any potential partnership. See Appendix of Exhibits and Excerpts of Deposition in Support of AT&T Corp.'s Motion for Summary Judgment, Exhibit 4. See also Internal Memorandum from Mary Jane McKeever of AT&T dated March 14, 1994 (Exhibit 19 at ¶7) (Transglobal "agreed to continue discussions with Bob Baulch" on the AT&T and Transglobal relationship); Memorandum from Clifford of Transglobal to Baulch of AT&T dated March 18, 1994 (Exhibit 5 at page 1) ("[w]e are in agreement that we will indeed work with Mary Jane regarding all issues concerning the supply services of our business . . . and with you regarding any interface responsibility for issues regarding potential partnership.")

It is also clear from the relevant documentation that an agreement was not reached in early January 1994 to provide Transglobal with the "lowest possible international long distance rates" for its proposed CTA business. Although there is little dispute that it was a subject of conversation amongst the parties, once again, the documentation reveals that the parties did not even begin negotiating the essential terms of the contract tariff until after the initial meeting in January 1994. For example, on April 11, 1994, AT&T Corp. submitted a proposed letter of intent to enter into a contract tariff to Transglobal entitled "AT&T Proposal for Switched Services." See id., Exhibit 21. This proposal was signed and

agreed to by Clifford on behalf of Transglobal on April 12, 1994. See id., Exhibit 21 at page3.[4] The letter of intent also provided that: "these terms require a tariff filing and regulatory approval and **will not be available until FCC approval.**" See id., Exhibit 21 at page 3(emphasis added). The parties then renegotiated some of the terms of the contract tariff and AT&T Corp. began drafting the contract tariff. See id., Exhibits 24, 25; see also Complaint ¶58.

On June 6, 1994, Transglobal signed a Contract Tariff Order[5] ("CTO") which provided that AT&T Corp. would take steps to file a contract tariff with the Federal Communications Commission ("FCC") consistent with the terms and conditions described in Attachment A to the CTO. See id., Exhibit 26, ¶3. The CTO also provided that Transglobal could, as its sole remedy, terminate the Agreement at any time before the Contract Tariff became effective if, without the consent of Transglobal, AT&T Corp. failed to file the Contract Tariff within 30 days, or if the Contract Tariff as filed was not consistent with Attachment A to the CTO, or if the Contract Tariff did not go into effect within 120 days after filing with the FCC. See id. Exhibits 26, 30. Significantly, the CTO also contained an integration clause which expressly provided that all prior agreements between the parties were superseded and that the CTO constituted the "entire agreement" between the parties with respect to the services as described in the CTO. See id., Exhibit 30.

On June 6, 1994, the same day it executed the CTO, Transglobal began providing CTA service. See Third-Party Complaint, ¶63. Transglobal acknowledges that it was aware that "[i]f the Contract Tariff containing the reduced rates was not in effect, then [Transglobal] would be charged according to AT&T's 'Megacom rates' as required under Federal law." See Complaint, ¶61. Transglobal also recognized that it would suffer a monetary loss if it became operational pursuant to the Megacom rates since it contends that it was

committed to selling its customers rates below that which it would be required to pay AT&T. See id. Nonetheless, Transglobal began providing CTA service on June 6, 1994 because it contends that AT&T represented that it would file a revised tariff which would "include a special cash allowance to reimburse [Transglobal] for the estimated difference between the billed amount at Megacom Rates and the Contract Tariff rates." See id.

Shortly thereafter, AT&T identified certain changes it wished to make in the language of the proposed Contract Tariff. See id. Exhibit 27. AT&T informed Transglobal of those changes and requested that it formally agree to them in writing. See id. By letter dated July 12, 1994, Transglobal's attorney expressed certain "concerns" about AT&T's proposed revisions to the Contract Tariff and suggested some further changes to the proposed tariff language. See id., Exhibit 28. AT&T responded to Transglobal's letter on July 14, 1994. See id., Exhibit 29. Among other things, AT&T noted that in order for the Contract Tariff to be effective on August 1, 1994, the date contemplated by the parties, it must be filed by July 18, 1994. See id. Transglobal agreed to the changes in the Contract Tariff proposed by AT&T and an AT&T representative signed the CTO on July 21, 1994. See id. Exhibit 30. Ultimately, the revised version of the Contract Tariff, known as "CT 1387," was filed with the FCC on July 18, 1994. See id., Exhibits 30, 31.

In early August 1994, however, the FCC requested that certain changes be made to the Contract Tariff. See id., Exhibit 32. AT&T Corp. informed Transglobal of the changes that needed to be made pursuant to the FCC's requirement and also suggested some additional changes it believed were needed. See id. Transglobal agreed to the FCC changes and the other proposed changes on August 26, 1994. See id., Exhibit 35.

On September 20, 1994, William Potter, Esq., on behalf of Transglobal, then forwarded a letter to AT&T regarding "significant issues" which needed to be resolved in order to "complete the contractual arrangements" between the parties. See id., Exhibit 36. AT&T viewed this letter as an attempt to renegotiate many of the terms of the Contract Tariff. See id., Exhibit 17. As a result of its conclusion that there was not a "meeting of the minds," AT&T withdrew CT 1387. See id.

Based upon the foregoing, it is clear that the parties did not reach an oral agreement in January 1994 to provide telecommunications services at a low rate to Transglobal under a contract tariff. There is no evidence of an agreement as to any of the terms prior to the date upon which the parties signed and initially filed the Contract Tariff with the FCC (which, in any event, was later rejected by the FCC) . In fact, the documentation submitted by both Transglobal and AT&T Corp. reveals that extensive negotiations took place after the initial meeting in January 1994 in an effort to reach agreement on many different issues relating to the CTA service.

B. Contract Tariff 1387

Interstate telecommunications carriers are regulated by the ("FCC") pursuant to Title II of the Communications Act of 1934, as amended. See 47 U.S.C. § 201, et seq. (West 1999). Because AT&T Corp. provides long distance telecommunications services as a "common carrier" it falls within the purview of the Communications Act of 1934. See 47 U.S.C. § 153(10)[6]; See 47 U.S.C. § 201, et seq. (West 1999) . As such, it is required to provide its services to any person upon reasonable request on terms that are just, reasonable, and nondiscriminatory. See 47 U.S.C. § 201; 47 U.S.C. § 202(a) (West 1999).

The duties owed by common carriers are regulated through tariffs. Pursuant to § 203, a common carrier such as AT&T Corp. is required to file "schedules" with the FCC, commonly referred to as "tariffs," "showing all charges" for its services and "the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a) (West 1999). See also MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 132 (D.N.J. 1995) . Once the tariffs have been filed and permitted by the FCC to become effective, the common carrier is precluded by statute from deviating from the terms of its filed tariffs. According to the statute: "No carrier shall . . .extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c). Thus, pursuant to the "filed rate doctrine/filed tariff doctrine," the filed rates are binding on both the carrier and the public. See Marco Supply Co. v. AT&T, 875 F.2d 434, 436 (4th Cir. 1989) (citations omitted) See also See Fax-Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 488 (2d Cir. 1998); MCI Telecommunications Corp. v. Graphnet, Inc., 881 F. Supp. 126, 132 (D.N.J. 1995). Despite the fact that strict adherence to the filed rate/filed tariff doctrine oftentimes produces harsh results, it is the operative doctrine to be applied by the courts. See Fax Telecommunicaciones, Inc. v. AT&T, 952 F. Supp. 946 (E.D.N.Y. 1996), aff'd, 138 F.3d 479 (2d Cir. 1998).

In 1991, the FCC adopted rules and regulations authorizing carriers to establish "contract tariffs" with their customers. See Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 482 (2d Cir. 1998) (citing In the Matter of Competition in the Interstate Interexchange Marketplace, 6 F.C.C.R. 5800 (1991) (hereinafter "Interstate Interexchange Marketplace"); on reconsideration, 6 F.C.C.R. 7569 (1991); on further reconsideration, 7 F.C.C.R. 2677 (1992), on further reconsideration, 10 F.C.C.R. 4562 (1995)). A contract tariff

contains individually negotiated and tailored services arrangements reached between a common carrier and its customer. See Telecom International America Ltd. v. AT&T Corp., 67 F. Supp. 2d 189, 196 n.4 (S.D.N.Y. 1999); National Communications Association, Inc. v. American Telephone & Telegraph Co., No. 92 Civ. 1735, 1998 WL 118174 *27 n.31 (S.D.N.Y. March 16, 1998) , The rules and regulations surrounding contract tariffs were designed to "increase flexibility for customers and promote competition among carriers." Fax Telecommunicaciones, 138 F.3d at 482.

In Fax Telecommunicaciones, the United States Court of Appeals for the Second Circuit explained the process whereby contract tariffs become effective. First, " [a]t least one customer must enter into a contract with the carrier pursuant to the new tariff in order for the carrier to file the contract tariff." Id. (citing 47 C.F.R. § 61.3(m)). Furthermore, the contract tariff must be filed at least fourteen days prior to the effective date of the contract and must include "the terms of the contract, a description of the services to be provided, the price for these services, the minimum volume commitments for each service, any volume discounts, as well as other classifications, practices, and regulations affecting the contract rate thereby complying with the filing requirements of 47 U.S.C. §203(a)." Id. (citing Interstate Interexchange Marketplace at ¶¶91, 121, 122). Upon expiration of the fourteen days, the contract tariff is effective so long as neither the FCC nor any member of the public objects. Id. (citing 47 C.F.R. §§ 61.58 (c) (6), 61.42(c) (8)). Finally, in order not to violate the Act's prohibition against discrimination, the carrier must then make the contract tariff generally available to other similarly situated customers. See id. (citing Interstate Interexchange Marketplace at ¶91, 129).

Here, it is undisputed that CT 1387 was not an effective tariff under federal law inasmuch as the FCC did not approve the tariff, as it was initially filed. See Opposition Brief filed on

behalf of Transglobal and Carraway at page 31 ("True, it could not use CT 1387 rates because that tariff was not in effect."). Furthermore, AT&T failed to file CT 1387 even after Transglobal agreed to the FCC changes because of its belief that there was no "meeting of the minds" on core issues. As a result, Transglobal began receiving service on June 6, 1994 pursuant to the Megacom tariff, the effective tariff on file with the FCC. Therefore, any claim either by Transglobal or Carraway that they are entitled to be charged the rates as set forth in CT 1387 is without merit.

Moreover, any claim by Transglobal that this Court should enforce the alleged promise by AT&T to file CT 1387, as amended by the parties, is equally without merit. Under circumstances similar to those presented in the matter at bar, the Court in Fax Telecommunicaciones explained that if the Court were to enforce AT&T's promise to file the rate structure in CT 1387 as amended by the parties, it would have to be done retroactively, thereby giving Transglobal the benefit of the rates promised. But, the Court reasoned that "this is no different in effect than asking the court to enforce the [CT 1387] rates directly," which it cannot do because the tariff was never filed. Telecommunicaciones, 138 F.3d at 490.

In addition, despite Transglobal's attempt to recharacterize its claim, the relief it seeks would provide it with a discount over other Megacom customers (the filed tariff which it knowingly used and was billed for) in violation of the nondiscrimination strand of the filed rate doctrine. The Fax Telecommunicaciones Court concluded that a party in Transglobal's position "may not indirectly accomplish that which it may not do directly." Id.

C. Contract Tariff Order

Assuming arguendo that Transglobal and Carraway are

attempting to take their breach of contract claim one step further and argue that AT&T breached the terms of the CTO signed by both parties by July 27, 1994, this claim too must fail. The terms of the CTO expressly bar any claim for damages for AT&T's failure to file the Contract Tariff. Specifically, the CTO provides that if, without the consent of Transglobal, AT&T Corp. failed to file the Contract tariff within 30 days, or if the Contract Tariff as filed was not consistent with Attachment A, or if the Contract Tariff did not go into effect within 120 days after filing with the FCC, Transglobal "may, as its **sole remedy**, terminate this Agreement without liability." See Exhibit 30.[7]

III. General Megacom Tariff

AT&T Corp. filed a counterclaim against Transglobal for: (1) failure to make payments for services rendered (Count One); (2) quantum meruit (Count Two); and (3) breach of Master Building Space License Agreement (Count Three). See Counterclaim.[8] Essentially, AT&T Corp. contends that, because CT 1387 was not in effect, Transglobal purchased service under AT&T's Megacom tariff and therefore understood that if the Contract Tariff containing the reduced rates was not in effect, then Transglobal would be charged according to AT&T's Megacom rates as required under Federal law. See Complaint, ¶61. AT&T Corp. is not seeking summary judgment on Count Three.

On September 2, 1994, AT&T Corp. wrote a letter to Transglobal wherein it stated that Transglobal owed a total balance of $51,200.46. See id., Exhibit 37. Therein, AT&T also noted that unless the "overdue" balance was paid, "AT&T will no longer accept orders for additional similarly tariffed services from Transglobal." See id. In response, Transglobal paid AT&T Corp. a lesser amount that it estimated it would have owed if the Contract Tariff had been in effect on June 6, 1994. See id., Exhibit 39 ("I am

forwarding with this letter a check for the amount that I estimate is due under the rates provided by the Contract Tariff."). In October 1994, AT&T advised Transglobal that its Megacom service would be terminated as a result of its failure to pay what AT&T believed was due and owing.

It is undisputed that CT 1387 never became an effective tariff. See Opposition Brief filed on behalf of Transglobal and Carraway at page 31. Accordingly, any contention by Transglobal that it is entitled to the rates in CT 1387 is misplaced. It is also undisputed that if the Contract Tariff containing the reduced rates was not in effect, then Transglobal would be charged according to AT&T's Megacom rates. Therefore, the filed tariff doctrine bars Transglobal's claims that it was entitled to any rates or terms of service other than those contained in AT&T Corp.'s filed and effective Megacom tariff. Clearly, Transglobal accepted the risk by beginning business before the date the Contract Tariff was filed **and** effective. Therefore, Transglobal must pay for the services rendered.

Prior to the Court entering a final judgment in this matter, it is ordered that AT&T provide to Transglobal and Carraway an accounting of the services rendered. The accounting should be in the form of a sworn affidavit and served by March 10, 2000. A copy should also be provided to the Court. By March 20, 2000, Transglobal and Carraway shall determine if there is a factual dispute as to the accounting for services rendered. If there is no dispute, then the parties will submit a proposed Order to the Court on March 20, 2000 reflecting the amount Transglobal and Carraway must pay to AT&T Corp. for services rendered. If there is a dispute as to the accounting, the parties will contact the Court on March 20, 2000 to schedule a plenary hearing on this issue.

An appropriate Order accompanies this Letter Opinion.
NICHOLAS H. POLITAN

U.S.D. J.
Footnotes

[1]The parties should consult the Order which accompanies this Letter Opinion for more specific instructions regarding AT&T's counterclaim.

[2]The telephone equipment was installed and operational on June 6, 1994.

[3]The CTA business exploits the differential between the lower rates charged for international and long distance telephone service provided by major United States telecommunications carriers and the substantially higher rates charged for such service by the government-controlled foreign telephone administrations or postal, telephone, or telegraph authorities. CTA technology allows a telephone customer in a foreign country to place an international or long distance call at a rate available from a CTA provider by using international outbound service to call an established CTA telephone number in the United States.

[4] See also Exhibit 14 (Transglobal "signed the letter of intent on 4-12-94."). The letter of intent specifically provided that: "[t]his offer is not predicated upon any co-marketing agreement with AT&T or any other contingencies not specified in this offer." See id., Exhibit 21 at page 3. See also Internal Memorandum from Jim Pagos of AT&T to Gail McGovern of AT&T dated June 8, 1994 (Exhibit 22) (stating that "the possibility of any co-marketing or partnering agreement has been positioned as a completely separate activity from the recent contract tariff.").

[5]As AT&T described to the Court in Telecom International America v. AT&T Corp., 67 F. Supp.2d. 189 n.3 (S.D.N.Y. 1999), "a contract tariff order is an agreement pursuant to which AT&T agrees to file with the FCC a relevant contract

tariff which describes the services to be provided by the common carrier. . .. Unlike a contract tariff, the contract tariff order does not need to be filed with the FCC and it is not considered to be part of the substantive terms of the filed contract tariff."

[6]According to the Act,

> The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter, but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(10) (West 1999).

[7]Based upon the facts of this case, the Court also finds that Transglobal and Carraway have failed to articulate a claim for breach of fiduciary duty, fraud, and negligent misrepresentation. See generally AT&T v. Central Office Telephone, Inc., 524 U.S. 214, _ , 118 S. Ct. 1956, 1962-63 (1998); Alexander v. CIGNA Corp., 991 F. Supp. 427, 438 (D.N.J. 1998), aff'd 172 F.3d 859 (3d Cir. 1998); Fax Telecommunicaciones, 138 F.3d 479, 490 (2d Cir. 1998).

[8]Pursuant to Count One, AT&T Corp. seeks actual and consequential damages no less than $379,030.06, prejudgment interest, costs of suit, and any other relief as the Court may deem just and proper. In Count Two, AT&T Corp. seeks the value received by Transglobal (which it contends is no less than $379,030.06), prejudgment interest, costs of suit, and any other relief as the Court may deem just and proper.

Finally, in Count Three, AT&T Corp. seeks actual and consequential damages of no less than $63,900.00, prejudgment interest, costs of suit, and any other relief as the Court may deem just and proper.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AT&T CREDIT CORPORATION, Plaintiff,	:	CIVIL ACTION No. 95-3676
v.	:	
TRANSGLOBAL TELCOM ALLIANCE, INC., et al., Defendants and Third-Party Plaintiffs,	:	HON. NICHOLAS H. POLITAN
	:	ORDER
v	:	
AT&T CORP., Third Party Defendant.	:	

THIS MATTER having come before the Court on two motions, namely: (1) the motion by third-party defendant AT&T Corporation for summary judgment on the Third-Party Complaint filed by defendants/third-party plaintiffs Transglobal Telecom Alliance, Inc. and James Carraway; and (2) the motion by third-party defendant AT&T Corporation for partial summary judgment on its counterclaim for failure to make payments for services rendered against defendant/third-party plaintiff Transglobal Telecom Alliance; and upon careful consideration of ail memoranda submitted in connection thereto; and for the reasons articulated in the Letter Opinion which accompanies this Order; and good cause having been shown,

IT IS on this 1st day of March, 2000,

ORDERED that the motion by third-party defendant AT&T Corporation for summary judgment on the Third--Party Complaint is GRANTED and the Third-Party Complaint filed by defendants/third-party plaintiffs Transglobal Telecom Alliance, Inc. and James Carraway is DISMISSED WITH PREJUDICE. Additionally, the motion by third-party

defendant AT&T Corporation for partial summary judgment on its counterclaim for failure to make payments for services rendered against defendant/third-party plaintiff, Transglobal Telecom Alliance is GRANTED; and it is further

ORDERED that, prior to the Court entering a final judgment in this matter, AT&T provide to Transglobal and Carraway an accounting of the services rendered. The accounting should be in the form of a sworn affidavit and served by March 10, 2000. A copy should also be provided to the Court. By March 20, 2000, Transglobal and Carraway shall determine if there is a factual dispute as to the accounting for services rendered. If there is no dispute, then the parties will submit a proposed Order to the Court on March 20, 2000 reflecting the amount Transglobal and Carraway must pay to AT&T Corp. for services rendered. If there is a dispute as to the accounting, the parties will contact the Court on March 20, 2000 to schedule a plenary hearing on this issue.

NICHOLAS H. POLITAN
U.S .D. J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AT&T CREDIT CORPORATION, Plaintiff,	:	CIVIL ACTION No. 95-3676
v.	:	
TRANSGLOBAL TELCOM ALLIANCE, INC., et al., Defendants and Third-Party Plaintiffs,	:	HON. NICHOLAS H. POLITAN
v	:	FINAL JUDGMENT
AT&T CORP., Third Party Defendant.	:	

THIS MATTER having been opened to the Court by Drinker Biddle & Shanley, LLP, attorneys for plaintiff Newcourt Communications Finance Corporation (f/k/a AT&T Credit Corporation) ("Newcourt"); and the Court having entered an Amended Order on May 22, 1997 granting a motion by Newcourt for summary judgment against defendants/third-party plaintiffs Transglobal Telecom Alliance, Inc. ("Transglobal") and James D. Carraway ("Carraway") and finding Transglobal and Carraway jointly and severally liable to Newcourt in the amount of $250,658.58 plus interest, attorneys' fees and costs of suit; and the Court having entered an Order on July 22, 1997 awarding Newcourt's attorneys' fees and costs of suit in the amount of $21,197.15; and the Court not having certified said summary judgment pursuant to Federal Rule of Civil Procedure 54(b); and the Court having entered an Order on March 1, 2000 granting a motion by third-party defendant AT&T Corporation ("AT&T Corp.") for summary judgment, thereby dismissing with prejudice the Third-Party Complaint filed by Transglobal and Carraway; and, in that same Order dated March 1, 2000, the Court having granted the motion by AT&T Corp. for partial summary judgment on its counterclaim for failure to make

payments for services rendered against Transglobal; and, in that same Order dated March 1, 2000, the Court having ordered that, prior to the Court entering a final judgment in this matter, AT&T Corp. provide to Transglobal and Carraway an accounting of the services rendered in the form of a sworn affidavit; and the Court having further indicated in said Order that if there was a factual dispute as to the accounting for services rendered, the Court would hold a plenary hearing on that issue; and AT&T Corp. having submitted an Affidavit by Donna Stock dated March 8, 2000 attesting to the services rendered to Transglobal and Carraway; and this Court having been advised that AT&T Corp. and Transglobal have agreed upon the amount of monies owed for services rendered, although Transglobal does not admit that it actually owes AT&T Corp. for services rendered; and good cause having been shown,

IT IS on this 29th day of March, 2000,

ORDERED that FINAL JUDGMENT be and hereby is entered in favor of plaintiff Newcourt Communications Finance Corporation (f/k/a AT&T Credit Corporation) against defendants/third-party plaintiffs Transglobal Telecom Alliance, Inc. and James D. Carraway, jointly and severally liable, in the amount of $271,855.73 plus pre-judgment and post-judgment interest; and it is further

ORDERED that FINAL JUDGMENT be and hereby is entered in favor of third party defendant AT&T Corporation against defendant/third-party plaintiff Transglobal Telecom Alliance, Inc. in the amount of $444,992.06; and it is further

ORDERED that this case is CLOSED.

NICHOLAS H. POLITAN,
U.S.D. J.